PLUNKETT COONEY

Legal Malpractice, Professional Liability, Equitable Lien Doctrine, Business Income Coverage Update

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South Carolina, Colorado, Texas, Arkansas Coverage Update
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Legal Malpractice – South Carolina

Sentry Select Ins. Co. v. Maybank Law Firm, LLC
No. 2016-001351, --- S.E.2d ---, 2018 WL 2423694 (S.C. May 30, 2018)

Answering a certified question from the federal district court, the South Carolina Supreme Court held that an insurer may maintain a direct malpractice action against counsel hired to represent the insured where the insurance company had a duty to defend. Sentry Select Insurance Company (Sentry) hired Roy P. Maybank (Maybank) of the Maybank Law Firm to defend a Sentry insured in a personal injury lawsuit. Maybank failed to timely answer requests to admit, and Sentry claimed that as a result of Maybank's negligence it had to settle the case for $900,000 when Maybank had previously represented to Sentry that the case could be settled in the range of $75,000 to $125,000. The Supreme Court held that "an insurer may bring a direct malpractice action against counsel hired to represent its insured. However, we will not place an attorney in a conflict between his client's interests and the interests of the insurer. Thus, the insurer may recover only for the attorney's breach of his duty to his client, when the insurer proves the breach is the proximate cause of damages to the insurer." The Supreme Court also noted that "[i]f the interests of the client are the slightest bit inconsistent with the insurer's interests, there can be no liability of the attorney to the insurer, for we will not permit the attorney's duty to the client to be affected by the interests of the insurance company[]" and as a final limitation on the insurer's right to bring a malpractice action against the lawyer it hired to represent the insured, "the insurer must prove its case by clear and convincing evidence." Because the Supreme Court affirmatively answered the certified question, it indicated that the federal district court should independently determine whether Maybank was negligent based on all the facts and circumstances of the case.

Professional Liability – Tenth Circuit (Colorado Law)

Evanston Ins. Co. v. Law Office of Michael P. Medved, P.C.
No. 16-1464, --- F.3d ---, 2018 WL 2306871 (10th Cir. May 22, 2018)

Evanston Insurance Co. filed suit against foreclosure attorney, Michael Medved (Medved), and his solo practice, alleging that its professional services liability policy did not extend coverage to a suit based on the firm's alleged overbilling practices. Medved represented lenders and investors, and although he billed them directly, the cost of his services was reportedly passed on to property owners. The U.S. District Court for the District of Colorado granted Evanston's motion for summary judgment, and the U.S. Court of Appeals for the Tenth Circuit affirmed, ruling that, under Colorado law, Evanston had no duty to defend Medved or his solo practice from a homeowner class action or an investigation by the state attorney general. The courts reasoned that the policy only covered "professional services," defined as "those services performed by [Medved] for others ... as a lawyer," and that billing did not fall within that definition. The record was clear, and Medved acknowledged under oath, that the class action and attorney general's allegations all arose from improper billing practices, not professional services. Medved, nonetheless, argued that his policy covered billing-related suits because it promised coverage for damages "by reason of" professional services. The appellate court disagreed, holding that "by reason of" is much more limited than "arising out of" and is not expansive enough to encompass billing matters.

Equitable Lien Doctrine – Fifth Circuit (Texas Law)

Sierra Equip., Inc. v. Lexington Ins. Co.
No. 17-10076, --- Fed. Appx ---, 2018 WL 2222695 (5th Cir. May 15, 2018)

The U.S. Court of Appeals for the Fifth Circuit held that Sierra Equipment Inc. (Sierra) lacked standing to sue Lexington Insurance Co. (Lexington) as Sierra was not identified in any loss payable clause in the property insurance policy that Lexington issued to LWL Management Inc. (LWL). Sierra had leased equipment to LWL under a lease agreement that required "LWL to insure the leased equipment, deliver a copy of the insurance policy to Sierra, and obtain a policy in form, in terms, in amount, and with insurance carriers reasonably satisfactory to Sierra." The agreement did not "require that the policy list Sierra as an additional insured or contain a loss payable clause listing Sierra."

After discovering that the equipment LWL had leased was lost, damaged or destroyed, Sierra initiated suit against Lexington seeking recovery under the policy. Lexington, however, argued that Sierra lacked standing to maintain such a suit. The appellate court first recognized that an "insurance policy is a personal contract between the insurer and the insured named in the policy and a stranger to the policy may not ordinarily maintain a suit on it." The appellate court also recognized that the equitable lien doctrine represented an exception, applying "in such instances as those where a mortgagor or lessee is charged with the duty of procuring such a policy with loss payable to the mortgagee or lessor."

Sierra argued its lease agreement with LWL qualified as such an agreement, especially as "LWL was required to deliver the insurance policy to Sierra and obtain a policy in terms satisfactory to Sierra." The

appellate court ultimately disagreed, finding that "the agreement between Sierra and LWL did not require that LWL obtain insurance with a loss payable clause to Sierra ... [a]nd the Lexington policy does not contain such a clause[,]" such that "Sierra, who was not a party to the insurance policy, does not have standing to sue Lexington."

Business Income Coverage – Eighth Circuit (Arkansas Law)

Welspun Pipes Inc. v. Liberty Mutual Fire Ins. Co.
No. 17-1470, --- F.3d ---, 2018 WL 2376479 (8th Cir. May 25, 2018)

The U.S. Court of Appeals for the Eighth Circuit held that Liberty Mutual Fire Insurance Company (Liberty Mutual) need not provide coverage for expenses incurred by Welspun Pipes Inc. (Welspun) when it moved production overseas following a fire at its Little Rock plant. The Liberty Mutual policy covered loss of income as well as certain expenses incurred to mitigate the loss of income, during a time period defined in the policy. Welspun sought coverage for business income as well as more than $13 million in expenses associated with moving production to India in order to comply with contract deadlines. The appellate court agreed with the district court's finding that these expenses were not covered because they were not "necessary" costs (as defined in the policy) that mitigated Welspun's lost income amounts that would need to be covered by Liberty Mutual. The appellate court noted that Welspun's reading of the policy would actually increase Liberty Mutual's obligation to an amount higher than if the insured had not mitigated the loss at all – an outcome that was specifically made impermissible by the policy.

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